Supreme Court, U.S.
FILED

NO. 01 1165 JAN 22 2002

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

ZIMMERN BEHARRY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX 1 TO PETITION FOR CERTIORARI REVIEW

On Petition for Certiorari to the United States Court of Appeals for the Eleventh Circuit

RHONDA A. ANDERSON, ESQ.
RHONDA A. ANDERSON, P.A.
COUNSEL FOR ZIMMERN BEHARRY
2222 PONCE DE LEON BLVD, SUITE 500
CORAL GABLES, FLORIDA 33134
TELEPHONE: (305) 444-1400

7218

TABLE OF CONTENTS

- [Fifth] Superseding Indictment filed on July 3, 1993 1-7
- Judgment and Commitment entered on March 11, 2000 8-22
- Eleventh Circuit Opinion [Non-Published] affirming District Court's Judgment and Commitment entered on July 6, 2001 23-30
- Zimmern Beharry's Petition for Rehearing and Rehearing *En Banc* 31-59
- Eleventh Circuit Order Denying Petition for Rehearing entered October 22, 2001 60
- Eleventh Circuit Mandate issued on August 13, 2001 61
- Constitutional Provisions & Statutes 62-70

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing was mailed *via* U.S. Mail, this 22d day of January 2002, to: ***Sangita K. Rao, Esq.,*** U.S. Department of Justice, P. O. Box 899, Benjamin Franklin Station, Washington, D.C. 20044-0899; and ***Solicitor General,*** Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. 20530.

Rhonda A. Anderson, Esq.
Rhonda A. Anderson, P.A.
Counsel for *Zimmern Beharry*
2222 Ponce De Leon Blvd.
Suite 500
Coral Gables, Florida 33134
Florida Bar No. 708038
Telephone: (305) 444-1400
Facsimile: (305) 444-1487

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 94-6015- CR-GONZALEZ

21 USC §952 (a)
21 USC §963
21 USC §841(a)(1)
21 USC §846
18 USC §2

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ZIMMERN BEHARRY,
SAROJAMIE BEHARRY, and
PATRICK KHAN,
Defendants.

_____/

FIFTH SUPERSEDING INDICTMENT

The Grand Jury charges that:

COUNT I

From or about September 1, 1993, the exact date being unknown to the Grand Jury, to on or about February 10, 1994, at the port of Savannah, Chatham County, Southern District of Georgia, at Port Everglades, Broward County, in the Southern District of Florida, and elsewhere, the defendants,

ZIMMERN BEHARRY and
SAROJAMIE BEHARRY,

did knowingly and intentionally combine, conspire, confederate and agree with each other and with persons, known and unknown to the Grand Jury, to import into

the United States, from a place outside thereof, a Schedule II narcotic controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 952(a); all in violation of Title 21, United States Code, Section 963.

COUNT II

On or about October 5, 1993, at the port of Savannah, Chatham County, Southern District of Georgia, and elsewhere, the defendants,

ZIMMERN BEHARRY and
SAROJAMIE BEHARRY,

did knowingly and intentionally import into the United States, from a place outside thereof, a Schedule II narcotic controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 952(a); and Title 18, United States Code, Section 2.

COUNT III

On or about February 2, 1994, at the Port Everglades, Broward County, in the Southern District of Florida, and elsewhere, the defendants,

ZIMMERN BEHARRY and
SAROJAMIE BEHARRY,

did knowingly and intentionally import into the United States, from a place outside thereof, a Schedule II narcotic controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 952(a); and Title 18, United States Code, Section 2.

COUNT IV

On or about February 10, 1994, at Port Everglades, Broward County, Southern District of Florida, and elsewhere, the defendants,

ZIMMERN BEHARRY,

did knowingly and intentionally import into the United States, from a place outside thereof, a Schedule II narcotic controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 952(a); and Title 18, United States Code, Section 2.

COUNT V

From on or about September 1, 1993, the exact date being unknown to the Grand Jury, to on or about February 10, 1994, at the port of Savannah, Chatham County, Southern District of Georgia, at Port Everglades, Broward County, in the Southern District of Florida, and elsewhere, the defendants,

ZIMMERN BEHARRY and
SAROJAMIE BEHARRY,

did knowingly and intentionally combine, confederate, and agree with each other and with other persons, known and unknown to the Grand Jury, to possess with intent to distribute a Schedule II narcotic controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 841(a)(1); all in violation of Title 21, United States Code, Section 846.

COUNT VII

On or about February 2, 1994, at Port Everglades, Broward County, in the Southern District of Florida,

and elsewhere, the defendants,

ZIMMERN BEHARRY and
SAROJAMIE BEHARRY,

did knowingly and intentionally possess with the intent to distribute a Schedule II narcotic controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT VIII

On or about February 10, 1994, at Port Everglades, Broward County, in the Southern District of Georgia, and elsewhere, the defendant,

ZIMMERN BEHARRY,

did knowingly and intentionally possess with the intent to distribute a Schedule II narcotic controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT IX

On or about July 1,1991, the exact date being unknown to the grand Jury, to on or about July 18, 1991, at Fort Lauderdale, Broward County, in the Southern District of Florida, and elsewhere, the defendants,

ZIMMERN BEHARRY and
PATRICK KHAN,

did knowingly and intentionally combine, conspire, confederate and agree with other persons, known and unknown to the Grand Jury, to possess with intent to

distribute a Schedule II narcotic controlled substance, that is, a mixture and substance containing a detectable amount of cocaine containing cocaine base, that is, crack cocaine, in violation of Title 21, United States Code, Section 841(a)(1) and 846.

COUNT X

On or about July 18,1991, at Fort Lauderdale, Broward County, in the Southern District of Florida, and elsewhere, the defendants,

ZIMMERN BEHARRY and
PATRICK KHAN,

did knowingly and intentionally posses with intent to distribute a Schedule II narcotic controlled substance, that is, a mixture and substance containing a detectable amount of cocaine containing cocaine base, that is, crack cocaine, in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

FORFEITURE COUNT

The Grand Jury further charges that:

As a result of defendants' commission of one or more of the felony offenses alleged in Counts I through X of this fifth superseding indictment, the United States is entitled to forfeiture of, and the defendants shall forfeit to the United States, all property constituting and derived from any proceeds which the defendants,

ZIMMERN BEHARRY,
SAROJAMIE BEHARRY, and
PATRICK KHAN,

obtained directly and indirectly, as a result of such violation or violations and any of the defendants'

properties used and intended to be used in any manner, and part, to commit and facilitate the commission of said violation or violations, pursuant to Title 21, United States Code, Section 853(a), including, but not limited to, Four Million Dollars ($4,000,000.00) in United States Currency.

If any of the assets described above as being subject to forfeiture pursuant to Title 21, United States Code, Section 853, as a result of any acts or omissions of the defendants,

ZIMMERN BEHARRY,
SAROJAMIE BEHARRY, and
PATRICK KHAN,

(a) cannot be located upon the exercise of due diligence;

(b) has been transferred or sold to, or deposited with a third person;

(c) has been placed beyond the jurisdiction of the court;

(d) has been substantially diminished in value; or

(e) has been commingled with other property which cannot be divided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of said defendants, ZIMMERN BEHARRY, SAROJAMIE BEHARRY, and PATRICK KHAN, up to the value of said property listed above as being subject to forfeiture.

By virtue of the commission by the defendants, ZIMMERN BEHARRY, SAROJAMIE BEHARRY, and PATRICK KHAN, of the felony violations of Title

21, United States Code, charged in Counts I through X of this fifth superseding indictment, any and all interest which the defendants have in the above-described property is vested in the United States and hereby forfeited to the United States pursuant to Title 21, United States Code, Section 853.

A TRUE BILL

_____

FOREPERSON

_____

WILLIAM A. KEEFER
UNITED STATE ATTORNEY

_____

JAMES R. BOMA
ASSISTANT UNITED STATE ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No.: 0:94CR06015-001

UNITED STATES OF AMERICA,

v.

ZIMMERN BEHARRY,

Defendant.

Roy Black, Esq.
Defendant's Attorney

JUDGMENT IN A CRIMINAL CASE

(For offenses Committed On or After November 1, 1987)

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____

☒ was found guilty on count(s) II, III, V and VI of the Indictment on 11/01/1999, after a plea of not guilty.

Title & Section	**Nature of Offense**	**Date Offense Concluded**	**Count No.(s)**
21 U.S.C. §951(a)	Importation of cocaine.	02/02/1994	II and III
21 U.S.C. §841(a)(1)	Possession with intent to distribute cocaine.	10/05/1993	V and VI

The defendant is sentenced as provided in pages 2 through 8 of this Judgment. The sentence is imposed pursuant to the Sentencing reform Act of 1984.

☐ The defendant has been found not guilty on count(s)_____.

☒ Count(s) I and IV are dismissed on the motion of the United States.

IT IS FURTHERED ORDERED that the defendant shall notify shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

03/10/2000
Date of Imposition of Judgment

Defendant's Social Security No.: 000-00-0000
Defendant's Date of Birth: 05/25/1963
Defendant's USM No.: 31439-004
Defendant's Residence Address: Fyzabad, Trinidad
Defendant's Mailing Address: Fyzabad, Trinidad

Daniel T.K. Hurley
United States District Judge
Name& Title of Judicial Officer

March 11, 2000
Date

Defendant: **ZIMMERN BEHARRY**
Case Number: 0:94cr06015-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **life**.

This term of imprisonment consists of la term of life as to each Counts II, III, V and VI of the Fifth Superseding Indictment, to be served immediately.

- ☐ The court makes the following recommendations to the Bureau of prisons:
- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution by the Bureau of Prisons:
  - ☐ before 2 p.m. on _____
  - ☐ as notified by the United States Marshall
  - ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

Defendant delivered on ___ to _____ at _____ with a certified copy of this judgment.

UNITED STATES MARSHAL

By_____

Deputy U.S. Marshal

AO245B(Rev.8/96)Sheet3-Supervised Release

Judgment-Page 3 of 8

Defendant: **ZIMMERN BEHARRY**

Case Number: 0:94cr06015-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 year(s).

This term of supervised release consists of a term of 5 years as to each of Count II, III, V and VI of the Fifth Superseding Indictment, to be served immediately.

The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance, The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable).

If this judgment imposes a fine, or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release. In accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below). See Special Conditions of Supervision - Page 4

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful

occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's

compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the Immigration and Naturalization Service for deportation proceedings consistent with the Immigration and Nationality Act.

If deported, the defendant shall not reenter the United States without the express permission of the United States Attorney General. The term of supervision shall be non-reporting if the defendant resides outside the United States. If the defendant should reenter the United States within the term of supervised release, the defendant is to report to the nearest United States Probation Office within 72 hours of his or her arrival.

Defendant: **ZIMMERN BEHARRY**
Case Number: 0:94cr06015-001

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 200.00	$ 250,000.00	$

☐ If applicable, restitution amount ordered pursuant to plea agreement.....$_____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $250,000.00.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ The interest requirement is waived.

☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred until ____. An Amended Judgment in a Criminal Case will be entered after such a determination.

☐ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

***Total Amount of Loss**	**Amount of Restitution Ordered**	**Priority Order or Percentage of Payment**
Name of Payee		
Totals:	**$**_____	**$**_____ **$**_____

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

Defendant: **ZIMMERN BEHARRY**
Case Number: 0:94cr06015-001

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ in full immediately; or

B ☐ $_____ immediately, balance due (in accordance with C, D, or E); or

C ☐ not later than ___; or

D ☐ in installments to commence ___ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule of appropriate; or

E ☐ in ____ *(e.g. equal, weekly, monthly, quarterly)* installments of $_____ over a period of ___ year(s) to commence ___ day(s) after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed Special instructions regarding the

payment of criminal monetary penalties:

The criminal monetary penalties are due immediately and shall be paid in U.S. Courts and addressed to: U.S. Clerk's office, ATTN: Financial Section, 301 N. Miami Avenue, Room 150, Miami, FL 33128. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's office are responsible for the enforcement of this order.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall forfeit the defendant's interest in the following property to the Untied States.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prison's Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

☐ The court adopts the factual findings and guideline application in the presentence report.

OR

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

See additional Factual Findings and Guideline Application Exceptions - Page 8

Guideline Range Determined by the Court:

Total Offense Level: 43
Criminal History Category: I
Imprisonment Range: Life
Supervised Release Range: 5 years
Fine Range: $ 25,000.00 to $16,000,000.00

☐ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $0.00

☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

- ☐ For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.
- ☐ Partial restitution is ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

The sentence is imposed based on the guideline range and the effects the offenses have on the community.

OR

☐ The sentence departs from the guideline range:

- ☐ upon motion of the government, as a result of defendant's substantial assistance.
- ☐ for the following specific reason(s):

ADDITIONAL FINDINGS AND GUIDELINE APPLICATIONS EXCEPTIONS

The court found that a two level upward adjustment pursuant to 3C1.1 was not warranted. The court found that a two level increase was warranted pursuant to 2D1.1(b)(1), because the defendant possessed a dangerous weapon (firearm) during the commission of the offense.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 00-11371

[DO NOT PUBLISH]

D.C. Docket No. 94-06015-CR-DTKH

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ZIMMERN BEHARRY,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(July 6, 2001)

Before BARKETT and HULL, Circuit Judges, and LIMBAUGH*, District Judge.

PER CURIAM:

Appellant Beharry, a citizen of Trinidad, was extradited to the United States, tried, and convicted of two counts of possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a) and two counts of importation of cocaine into the United States in violation of 21 U.S.C. § 952(a). Beharry appeals his convictions and his concurrent sentences of life imprisonment on all four counts.

On appeal, Beharry raises the following issues in support of his contention that his convictions and sentences should be reversed: (1) that misrepresentations by government agents in connection with Beharry's extradition and indictment violated his due process rights and the extradition treaty between the United States and Trinidad; (2) that the government violated 18 U.S. C. § 201(c)(2) and Beharry's due process rights by paying government witness Wade Lalla $5,000; (3) that the government violated Federal Rule of Criminal Procedure 16 by failing to disclose prior to trial a Trinidadian police officer would testify regarding a statement made by Beharry during a traffic stop; (4) that the government violated Federal Rule of Criminal Procedure 16 and Brady v. Maryland by

failing to produce the passport of cooperating government witness Dabid Nash; (5) that the trial judge gave an impermissibly coercive Allen charge; and (6) that Beharry's life sentences violate the rule established by Apprendi v. New Jersey, 530 U.S. 466 (2000). Beharry argues that the several alleged instances of misconduct by the government, independently and cumulatively, require reversal of his convictions and dismissal of the indictment against him.

After careful review and oral argument, we find that all of the issues raised by Beharry lack merit. We find that only three issues warrant brief discussion.

I. Government Misrepresentations in Grand Jury and Extradition Proceedings

First, we discuss the misrepresentations made by government agents in connection with certain grand jury proceedings and Beharry's extradition from Trinidad.[1] Beharry moved to dismiss the indictment at the close of the government's case-in-chief and against following the conclusion of all evidence at trial based upon the government's alleged misconduct in this

---

[1]Because Beharry's argument with respect to the government misrepresentations fails even assuming that he has standing to raise that argument, we do not reach the standing questions regarding extradition for purposes of deciding Beharry's appeal. We also note that Beharry has not demonstrated clearly that the government misrepresentations at issue were made before the actual grand jury that indicted him. However, because Beharry's argument fails even assuming that they were, we need not resolve that questions either.

regard. The district court denied these motions. We review the denial of a motion to dismiss an indictment for abuse of discretion. United Stares v. Sigma Int'l, Inc., 244 F.3d 841, 851 (11th Cir. 2001).

Beharry has shown that certain government agents made misrepresentations relating to the confidential informant "Carlos Manaracha" and the pursuit of a white van in which he was riding. For example, the government even conceded that false representations were made during certain grand jury proceedings nd Beharry's extradition proceedings that "Carlos" was an unknown "fugitive" being sought for arrest, despite the fact that "Carlos" was actually a confidential informant working with the government.[2] While we understand the government's reluctance to identify "Carlos" correctly as a confidential informant, the desire to protect a confidential informant is no excuse whatsoever for making false statements under oath in connection with a grand jury or extradition proceeding and we do not condone such a practice under any circumstances.

The impropriety of the misrepresentations in this

---

[2]Although DEA agent Duffy attempted to justify his prior false representations regarding Carlos during his trial testimony, there is no claim that any false representations were made concerning Carlos at trial or by any of the prosecutors who tried the case for the government. Further, we note that agent Duffy was cross-examined extensively by Beharry's counsel before the jury at trial with respect to his prior misrepresentations.

case notwithstanding, Beharry cannot succeed on his due process claim. To establish a due process violation, Beharry must establish more than the falsity of the statements at issue. He must demonstrate material misrepresentations resulting in "grave doubt" that the grand jury's decision to indict was free from the substantial influence of the government's misconduct. Bank of Nova Scotia v. United States, 487 U.S. 250, 256 (1988); see also United States v. Sigman Int'l, Inc., 244 F.3d 841, 853 (11th Cir. 2001). After careful review, we find that all of the misrepresentations were not material with respect to either the grand jury proceedings or the extradition proceedings. Beharry has failed to establish any "grave doubt" that the grand jury's decision to indict was free from the substantial influence of the misrepresentations regarding the status of "Carlos: as a confidential informant.

Although the confidential informant was peripherally involved in the drug transactions for which Beharry was convicted (or at least the February 2, 1994 drug transaction), the informant's existence, identity, and participation appear to have played no significant role in the decisions to indict, extradite, and convict Beharry. For example, the actions of government witnesses Nash and Lalla on the critical dates were the centerpiece of the government's case against Beharry for the importation offenses on those dates. Even assuming that the grand jury inferred from the misrepresentations about "Carlos" that there was a fugitive still involved with Beharry and drug trafficking at the time of the indictment, any such inference has no

material bearing on the February 2 and February 10 crimes for which Beharry was inducted and convicted. Further, Beharry has not established that his misunderstanding regarding Carlo's status as a confidential informant prejudiced the preparation of his defense. Beharry's primary defense at trial was thathe was not involved in drug dealing anf that the testimony of the coperating government witness was not credible. In sum, we find no due process violation and no abuse of discretion in the district court's denial of Beharry's motions to dismiss the indictment based on these misrepresentations.[3]

II Allen Charge

With respect to the Allen charge given to the jury during deliberations in Beharry's case, we find that the totality of the circumstances surrounding the Allen charge and the language of the charge given fail to demonstrate that the charge was unduly coercive. See United States v. Elkins, 885 F.2d 775, 783 (11th Cir. 1989); United States v. Chigbo, 38 F.3d 543, 545 (11th Cir. 1994). Further, the fact that Beharry's jury failed to reach a verdict with respect to two of six counts after the Allen charge was given also demonstrates that the jury was not unduly coerced into reaching a verdict by the charge. See United States v. Trujillo, 146 F.3d 838, 847 n.6 (11th Cir. 1998) ("We also note that this [Allen]

---

[3]For the same reasons, Beharry has failed to demonstrate that the government's conduct violated the extradition treaty governing extradition between the United States and Trinidad at the time of Beharry's extradition.

charge could not have been too unduly coercive, as the jury was unable to reach a verdict as to Ruiz after the district court gave it.").

III. Apprendi Error

Turning to the merits of Beharry's Apprendi claim, the government concedes that the indictment in the instant case did not allege any drug quantities in connection with Beharry's importation and possession with intent to distribute offenses. Nor was the issue of drug quantity submitted to the jury for a finding beyond a reasonable doubt. Nonetheless, the district court sentenced Beharry to concurrent terms of life imprisonment based on judge-made drug quantity findings at sentencing, a term of imprisonment well over the twenty-year statutory maximum penalty applicable to both his possession with intent to distribute and importation drug offenses under 21 U.S.C. §§ 841 (b)(1)(C) and 960(b) without regard to drug quantity.[4] As the government concedes, therefore,

---

[4]Like the penalty provisions governing § 841 (a) drug offenses, the penalty provisions governing the importation of drugs under 21 U.S.C. § 960(b) also vary based upon the drug quantities involved in the offense. While certain maximum penalties are available for the importation of specific drug quantities only, other lower maximum penalties apply to importation offenses without reference to drug quantity. See 21 U.S.C. §§ 960(b)(1)(2), and (3). Thus, the application of Apprendi to § 841 drug prosecutions for possession with intent to distribute also governs the substantially similar penalty provisions for prosecutions involving the importation of drugs

Beharry's sentence violates Apprendi. See United States v. Candelario, 240 F.3d 1300, 1306 (11th Cir. 2001) (explaining that there is Apprendi error where drug quantity is not charged in the indictment and submitted to a jury for a determination beyond a reasonable doubt "if the defendant's sentence exceeds the maximum sentence allowed by a statute without regard to drug quantity").

Thus, the question is only whether the error violated Beharry's substantial rights.[5] We agree with the government that there is no prejudice to Beharry's substantial rights as a result of the Apprendi error because the undisputed evidence offered at trial with respect to drug quantities was overwhelming and more than sufficient to support Beharry's concurrent life

---

under 21 U.S.C. § 952.

[5]The parties dispute whether Beharry's Apprendi claim is subject to preserved error review or plain error review. We need not decide which standard applies, however, because the result in this case is the same under either standard of review. See Candelario, at 1310 n.14 ("We recognize that in drug cases alleging Apprendi violations, there is no material difference between preserved error review and plain error review, with the exception of this burden-shifting regarding substantial rights. Moreover, to this date, this difference in who bears the burden of proof has not yielded different results in drug cases alleging Apprendi violations. If this pattern holds, the only functional difference between preserved error review and plain error review will be the fourth prong of plain error review.").

sentences. Specifically, cooperating government witness David Nash testified that he retrieved 30 kilograms of cocaine on February 2 on Beharry's instructions and that 20 kilograms belonged to Beharry. Further, cooperating government witness Wade Lalla testified that he took possession of 36 kilograms of cocaine on February 10 pursuant to Beharry's instructions. Finally, the defense expressly conceded at sentencing that "46 kilograms of cocaine" was the "combined amount of the two importations of which Mr. Beharry was convicted." In light of this evidence regarding drug quantity with respect to the two dates at issue Beharry's possession with intent to distribute and importation offenses, we find that no rational jury could have convicted Beharry of those offenses without also finding that he imported and possessed with intent to distributer at least five kilograms pf cocaine, a quantity sufficient to support a life sentence under both 21 U.S.C. §§ 841 (b) and 960 (b), the relevant penalty provisions for Beharry's possession with intent to distribute and importation offenses. See United States v. Swatzie, 228 F.3d 1278, 1282-83 911th Cir. 2000) ("no evidentiary basis existed for the jury reasonably to have found that Swatzie possessed drugs with intent to distribute," but did not possess at least the amount necessary to trigger the maximum life sentence).

AFFIRMED.

CASE NO. 00-11371

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee/Plaintiff,
vs.
ZIMMERN BEHARRY,
Appellant/Defendant.

On Appeal From The United States District Court
For The Southern District of Florida,
West Palm Beach Division, Criminal Division
Case No. 94-6015-Cr-Hurley

PETITION FOR REHEARING AND REHEARING *EN BANC*

RHONDA A. ANDERSON, ESQ.
RHONDA A. ANDERSON, P.A.
COUNSEL FOR ZIMMERN BEHARRY
2222 PONCE DE LEON BLVD.,SUITE 500
CORAL GABLES, FLORIDA 33134
Telephone: (305) 444-1400
Facsimile: (305) 444-1487

CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel for the Appellant, *Zimmern Beharry,* hereby certifies pursuant to Eleventh Circuit Rule 26-1.1 that the following is a complete list of persons and entities who have an interest in the outcome of this case:

Rhonda A. Anderson, Esq.,
counsel for Appellant Beharry

Karen Atkinson, Assistant U.S. Attorney

Zimmern Beharry, Defendant/Appellant

Roy Black, Esq., *Black, Srebnick & Kornspan,*
counsel for Appellant Beharry

Hon. Daniel T.K. Hurley,
U. S. District Court Judge

Christine Ng, Esq., *Black, Srebnick & Kornspan,*
counsel for Appellant Beharry

Jacqueline Perczek, Esq., *Black, Srebnick & Kornspan*, counsel for Beharry

Bruce Reinhart, Esq., Assistant U.S. Attorney

Sangita Rao, Esq.,
Dept. of Justice, Criminal Appellate Section

STATEMENT IN SUPPORT OF *EN BANC* CONSIDERATION

I express an belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court and that consideration by the fully court is necessary to secure and maintain uniformity of decisions in this Court with the United States Supreme Court. Additionally, I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

I. As to whether *Apprendi* prohibits a court from determining the quantity of drugs for defendants charged with drug offenses, where the indictment does not allege the quantity of drugs, the indictment fails to charge the penalty provisions, and the jury was *not* instructed to determine the quantity of drugs beyond a reasonable doubt?

A. ***Apprendi v. New Jersey,*** 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

B. ***United States v. Baptiste,*** - F.3d - , 2001 WL 1006712 (5th Cir. 2001).

C. ***United States v. Gonzalez,*** 259 F.3d 355 (5th Cir., 2001).

D. ***United States v. Longoria,*** 259 F.3d 363 (5th Cir.), *rehrng en banc granted,* - F.3d -, 2001 WL 946413 (5th Cir., Aug. 15, 2001).

E. ***United States v. Buckland,*** 259 F.3d 1107 (9th Cir., Aug. 9, 2001).

F. ***United States v. Candelario,*** 240 F.3d 1300 (11th Cir.), *cert. denied,* 121 S.Ct. 2535 (2001).

G. ***United States v. Tran,*** 234 F.3d 798 (2d Cir. 2000).

H. ***Grosso v. United States,*** 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 902 (1968).

I. ***Jones v. United States,*** 526 U.S. 277, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999).

J. ***Marchetti v. United States,*** 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968).

K. ***United States v. R.L.C.,*** 503 U.S. 291, 112 S.Ct. 1329, 117 L.Ed.2d 559 (1992).

II. As to whether the United States Sentencing Guidelines are statutes?

A. ***United States v. R.L.C.,*** 503 U.S. 291, 112 S.Ct. 1329, 117 L.Ed.2d 559 (1992).

III. As to whether plain error review applies where the law in support of the issue raised was not decided until after the Petitioner/Defendant's trial and sentencing?

A. ***Grosso v. United States,*** 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 902 (1968).

B. ***Marchetti v. United States,*** 390 U.S. 39, 88 S.Ct.

697, 19 L.Ed.2d 889 (1968).

C. ***United States v. Candelario,*** 240 F.3d 1300 (11th Cir.), *cert. denied,* 121 S.Ct. 2535 (2001).

D. ***United States v. Swatzie,*** 288 F.3d 1278 (11th Cir. 2000).

E. ***Jones v. United States,*** 224 F.3d 1251 (11th Cir. 2000).

F. ***Harris v. United States,*** 149 F.3d 1304 (11th Cir. 1998).

RHONDA A. ANDERSON, ESQ.

CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned hereby certifies that the type size and style in this brief is 14 point Times New Roman Scalable type.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS . . . C-1
STATEMENT IN SUPPORT OF *EN BANC* CONSIDERATION i
CERTIFICATE OF TYPE SIZE AND STYLE iii
TABLE OF CITATIONS ix
STATEMENT OF ISSUES 1
STATEMENT OF FACTS NECESSARY FOR REHEARING 1
ARGUMENT 4
I. THE DISTRICT COURT LACKED JURISDICTION TO IMPOSE ANY SENTENCE DUE TO THE FAILURE OF THE INDICTMENT TO ALLEGE A SPECIFIC PENALTY PROVISION AND/OR THE QUANTITY OF DRUGS 7
II. BASED UPON THE RELEVANT INQUIRY IN *APPRENDI,* TITLE 21 U.S.C. 841 AND TITLE 21 U.S.C. 960 ARE UNCONSTITUTIONAL, BECAUSE EACH EXPOSE A DEFENDANT TO A GREATER PUNISHMENT THAN AUTHORIZED BY THE JURY'S GENERAL GUILTY VERDICT 11

III. THIS COURT'S ANALYSIS OF THE *APPRENDI* CLAIMS IMPROPERLY APPLIES A PLAIN ERROR STANDARD OF REVIEW FOR DEFENDANTS TRIED AND SENTENCED BEFORE *APPRENDI* WAS CONSIDERED OR DECIDED BY THE UNITED STATES SUPREME COURT, AND BEFORE ANY AUTHORITY IN THIS CIRCUIT PROVIDED GROUNDS FOR SUCH RELIEF 12

A. *A Sentence Above the Statutory Maximum is Reversible Per Se* 12

B. *Plain Error Analysis Never Applies to Jurisdictional Errors* 14

CONCLUSION 15

CERTIFICATE OF SERVICE 16

TABLE OF CITATIONS

Table of Cases:

Almendarez-Torrez v. United States,
523 U.S. 224, 118 S.Ct. 1219,
140 L.Ed.2d 350 (1998) 8

Apprendi v. New Jersey,
530 U.S. 466, 120 S.Ct. 2348,
147 L.Ed.2d 435 (2000) ..... i, ii, 1, *passim*

Edwards v. United States,
523 U.S. 511, 118 S.Ct. 1475 9

Grosso v. United States,
390 U.S. 62, 88 S.Ct. 709,
19 L.Ed.2d 902 (1968) i,ii,13-14

Harris v. United States,
390 F.2d 616 (8th Cir. 1968) 13-14

Jones v. United States,
526 U.S. 277, 119 S.Ct. 1215,
143 L.Ed.2d 311 (1999) ..... i,ii,2,8, *passim*

Jones v. United States,
224 F.3d 1251 (11th Cir. 2000) 12

Marchetti v. United States,
390 U.S. 39, 88 S.Ct. 697,
19 L.Ed.2d 889 (1968) ii,13

Stirone v. United States,
361 U.S. 212, 80 S.Ct. 270,
4 L.Ed.2d 252 (1960) 15

United States v. Alvarez,
735 F.2d 461 (11th Cir. 1984) 14-15

United States v. Baptiste,
- F.3d -, 2001 WL 1006712
(5th Cir. Aug. 31, 2001) 7

United States v. Buckland,
259 F.3d 1107 (9th Cir., Aug. 9, 2001) ..... i, 6,11
United States v. Candelario,
240 F.3d 1300 (11th Cir),
121 S.C.t 2535, *cert.dened,* (2001) ..... ii, 6,12
United States v. Coy,
19 F.3d 629 (11th Cir. 1984) 14
United States v. Edelman,
873 F.2d 791 (11th Cir. 1989) 13
United States v. Fern,
155 F.3d 1318 (11th Cir. 1998) 15
United States v. Gayle,
967 F.2d 483 (11th Cir. 1992) 15
United States v. Gonzalez,
259 F.3d 355 (5th Cir., July 19, 2001) i,7,9
United States v. Hitchcock,
- F.3d -, 2001 WL 951273
(9th Cir., Aug. 23, 2001) ii,6,11
United States v. Longoria,
259 F.3d 363 (5th Cir. 2001),
rehrg en banc granted, - F.3d -,
2001 WL 946413 (5th Cir., Aug. 15, 2001) . 6,8-9
United States v. Maslin,
- F.Supp.2d, 2000 WL 1294254
(N.D.N.Y., Sept. 14, 2000) 15
United States v. Meacham,
626 F.2d 503 (5th Cir. 1980) 15
United States v. R.L.C.,
503 U.S. 291, 112 S.Ct. 1329,
117 L.Ed.2d 559 (1992) ii,10

United States v. Swatzie,
228 F.3d 1278 (11th Cir. 2000) ..... ii, 4-5,12
United States v. Tran,
234 F.3d 798 (2d Cir. 2000) 7
United States v. Woodard,
938 F.2d 1255 (11th Cir. 1991) 12-13
Walker v. Mortham,
158 F.3d 1177 (11th Cir. 1998),
cert. denied, 120 S.Ct. 39 (1999) 13

OTHER AUTHORITIES:

U.S. Constitution:
Fifth Amend. 9
Sixth Amend. 9
United States Code:
18 U.S.C. § 1326(b)(2) 8
21 U.S.C. § 841 11
21 U.S.C. § 841(a)(1) 5,8
21 U.S.C. § 841(b) 7,11
21 U.S.C. § 841(b)(1)(D) 6
21 U.S.C. § 952(a) 5
21 U.S.C. § 960 7,11
26 U.S.C.A. § 4411 13
28 U.S.C. § 2106 14
U.S.S.G. § 2D1.1(a) 3,8

STATEMENT OF THE ISSUES

II. WHETHER THE DISTRICT COURT LACKED JURISDICTION TO IMPOSE ANY SENTENCE DUE TO THE FAILURE OF THE INDICTMENT TO ALLEGE A SPECIFIC PENALTY PROVISION AND/OR THE QUANTITY OF DRUGS?

II. WHETHER BASED UPON THE RELEVANT INQUIRY IN *APPRENDI,* TITLE 21 U.S.C. 841 AND TITLE 21 U.S.C. 960 ARE UNCONSTITUTIONAL, BECAUSE EACH EXPOSE A DEFENDANT TO A GREATER PUNISHMENT THAN AUTHORIZED BY THE JURY'S GENERAL GUILTY VERDICT?

III. WHETHER THIS COURT'S ANALYSIS OF THE *APPRENDI* CLAIMS IMPROPERLY APPLIES A PLAIN ERROR STANDARD OF REVIEW FOR DEFENDANTS TRIED AND SENTENCED BEFORE *APPRENDI* OR *JONES* WERE CONSIDERED OR DECIDED BY THE UNITED STATES SUPREME COURT, AND BEFORE ANY AUTHORITY IN THIS CIRCUIT PROVIDED GROUNDS FOR SUCH RELIEF?

STATEMENT FACTS NECESSARY FOR REHEARING

Both the trial and sentencing hearing[1] in this cause were held well before the Supreme Court decided ***Apprendi v. New Jersey,*** 530 U.S. 466, 120 S.Ct. 2348,

---

[1]Mr. Beharry's trial concluded on November 1, 1999, and his sentencing occurred on March 13, 2000. (R-586-2870-72, R-549).

147 L.Ed.2d 435 (2000).[2]

Mr. Beharry's indictment did not charge, nor did the jury find, any amount of drugs attributable to *Mr. Beharry*. (R-179; R-514; R.E. 2). Throughout the trial, *Mr. Beharry* vigorously challenged the allegations and testimony against him. Likewise, at sentencing, *Mr. Beharry* vigorously objected in writing and orally to both the factual allegations in the PSI Report, as well as the proposed drug quantity in the PSI. (R-545, 546, 548, 587).

The vast majority of the drugs that the trial court attributed to *Mr. Beharry* at sentencing came from incidents that were part of the broad conspiracies that the jury acquitted *Mr. Beharry* of. (R-545, 587). Moreover, *Mr. Beharry* argued at sentencing that the evidence presented at trial failed to show – beyond a reasonable doubt – that the drug quantities subsequently alleged in the PSI Report were attributable to *Mr. Beharry*.

Notably, the same drug quantities that this Court opined that the jury must have concluded that *Beharry* possessed in order to convict him of the substantive offenses, the jury necessarily found incredible and rejected as sufficient evidence to show that *Mr. Beharry* conspired to commit the substantive charges he was convicted of. Thus, *Mr. Beharry's* acquittal of the conspiracy charges regarding the same drugs bars this Court's inference that "no rational jury could have

---

[2]Decided June 26, 2000 - three months after *Beharry's* sentencing. (R-549).

convicted *Beharry* of those [substantive] offenses without also finding that he imported and possessed with intent to distribute at least five kilograms of cocaine...." *Opinion,* at 8.

The Government did not request a special jury instruction or verdict form for the jury to determine drug quantity, and, therefore, the Record is silent as to whether the jury found – beyond a reasonable doubt – that *Mr. Beharry* imported and/or possessed with the intent to distribute over five kilograms of cocaine into the United States. Thus, the jury *not* to determine that at least five (5) kilograms of cocaine were attributable to Mr. Beharry – by any burden of proof whatsoever.

Additionally, this Court's conclusion that the counsel's alternative argument at sentencing was a "concession" is misplaced. That fall-back position was presented at sentencing only after the trial court flatly rejected all of *Beharry's* earlier factual objections as to drug quantity, which clearly were not argued or "conceded" at trial. *See, Beharry's Reply Brief,* at 8-9.

During the sentencing hearing on March 13, 2000, the District Court found that over 150 kilograms of cocaine were attributable to *Mr. Beharry* based upon the combination of testimony that was presented at the sentencing hearing (and not the petit jury) and the trial testimony. (R-3038). Thus, even though the jury never found beyond a reasonable doubt that the threshold amounts in the charging statute or the Sentencing Guidelines necessary to sentence *Mr. Beharry* to life imprisonment, the trial court imposed the harshest sentence available on a indictment that merely charged

Mr. Beharry with a "detectable amount" of cocaine.

As a result, as a Criminal History Category I first offender, *Beharry's* total offense level under Section 2D1.1 before any other adjustments are made, was a level 38,[3] which required an imprisonment range of 235-293 months. (R-3038).

ARGUMENT

This Court misapplied ***United States v. Swatzie,*** 228 F.3d 1278 (11th Cir. 2000), to the instant case to hold that "no rational jury could have convicted Beharry" for importation and/or possession with intent to distribute,

---

[3]Under USSG 2D1.1, a quantity of 150 kg or more of cocaine requires an offense level of 38 with a Category I sentencing range of 235 to 293 months (19½ to 24½ years). However, if the jury had found that only five kilograms were attributable to *Beharry* beyond a reasonable doubt, then 2D1.1 would provide for an offense level of 32 with a sentencing range of 121-151 months (approx. 10 to 15 ½ years). Thus, even after a five level increase to level 37 (210-262 months), *Mr. Beharry's* sentence would have fallen below life imprisonment. However, as argued *infra,* because the indictment did not allege any quantity of cocaine or any penalty provisions, the trial court lacked jurisdiction to sentence *Beharry* to more than a "detectable" amount of cocaine (to-wit: level 12), and the trial court could not use any of the evidence of drug quantity adduced at trial to support a finding for a higher drug quantity than charged in the indictment.

"without also finding that he possessed with intent to distribute at least 5 kilograms of cocaine, a quantity sufficient to support a life sentence under 21 U.S.C. §§ 841(b) and 960(b)," - which were not charged in the indictment. *Opinion* at 9.

First, in contrast to the case at bar, in ***Swatzie,*** the indictment specifically alleged the penalty provision for the offense charged. 228 F.3d at 1280. Second, unlike ***Swatzie,*** *Mr. Beharry* never conceded that a plain error analysis applied. 228 F.3d at 1281. Additionally, ***Swatzie,*** a panel decision, did not properly overrule prior precedent holding that a sentence that exceeds the statutory maximum is reversible *per se.* Further, ***Swatzie*** failed to properly raise a Fifth Amendment argument that his constitutional rights were violated due to the grand jury's failure to find probable cause as to drug quantity. *Id.* Additionally, unlike the case at bar, the evidence in ***Swatzie*** was uncontradicted, (228 F.3d, at 1279), and ***Swatzie*** never "put the amount of and form of cocaine at issue by objecting to the presentence report's findings as to these two facts." 228 F.3d, at 1280. Thus, ***Swatzie*** is both legally and factually distinguishable from the instant case.

Further, as noted in the statement of facts, *supra,* the evidence at trial regarding drug quantities was vigorously disputed not inferible from the jury's guilty verdict on the substantive offenses, because *(a)* the indictment failed to charge *Beharry* with any specific quantity of drugs, *(b)* the jury was not instructed that it must find a quantity of drugs beyond a reasonable doubt, or by any standard, and *(c)* the jury's acquittal of

Beharry of the overarching conspiracy charges demonstrated that the jury found the Government's witnesses incredible. Thus, *Mr. Beharry's* acquittal of the conspiracy charges regarding the same drugs bars this Court's inference that "no rational jury could have convicted *Beharry* of those [substantive] offenses without also finding that he imported and possessed with intent to distribute at least five kilograms of cocaine...." *Opinion*, at 8.

This Court also failed to address *Beharry's* arguments that:

(1) the trial court did not have jurisdiction to base his sentence on 150 kilograms of cocaine where the indictment only charged him with "detectable" quantity of cocaine,

(2) that this Court lacked jurisdiction to sentence *Mr. Beharry* where the Counts of conviction for the narcotics offenses only charged him with violations of Title 21 U.S.C. 952(a) and 21 U.S.C. 841(a)(1), and did not charge him with any penalty provisions,

(3) that the quantity of drugs *Mr. Beharry's* sentence was based on had to be determined by the jury, beyond a reasonable doubt -- and not by a trial court, or a jury by a lesser burden of proof,

(4) that the "plain error" standard of review is not applicable for ***Apprendi*** errors, and

(5) that the "credible evidence" does not show beyond a reasonable doubt that a 150 kilograms or more of cocaine is attributable to *Mr. Beharry*.

Furthermore, rather than the plain error vs.

preserved error analysis that this Court adopted in ***United States v. Candelario,***[4] a *per se* reversible error standard must be applied – especially for defendants like *Beharry* who were tried and sentenced before the Supreme Court's decision in ***Apprendi.***

Additionally, after this Court's decision herein, decisions of the Fifth and the Ninth Circuit were issued that conflict with this Circuit's precedent as follows:

In ***United States v. Buckland,*** 259 F.3d 1107 (9th Cir. Aug. 9, 2001), the Ninth Circuit held that determinate sentencing provisions of the federal narcotics statutes which permit a judge to find, under a preponderance of evidence standard, a fact that increases a maximum penalty to which a defendant is exposed, are unconstitutional. *See also,* ***United States v. Hitchcock,*** - F.3d -, 2001 W.L. 951273 (9th Cir., Aug. 23, 2001)(same).

In ***United States v. Longoria,*** 259 F.3d 363 (5th Cir., 2001), *rehrg en banc granted*, - F.3d -, 2001 WL 946413 (5th Cir., Aug. 15, 2001), the Fifth Circuit held that the failure of indictment to charge a drug quantity and specific reference in the indictment to 21 U.S.C. 841(b)(1)(D) deprived the district court of jurisdiction to sentence defendant to more than 5 years incarceration).

Additionally, the Fifth Circuit held in ***United States v. Gonzalez,*** 259 F.3d 355, 359 (5th Cir .2001), *reh'g en banc granted* (5th Cir. Aug. 15, 2001), that where an indictment does not allege a drug quantity, the evidence

---

[4]240 F.3d 1300 (11th Cir.), *cert. denied,* 121 S.Ct. 2535 (2001).

adduced at trial supporting the trial court's finding of drug quantity is not relevant. *See also,* ***United States v. Baptiste,*** - F.3d - , 2001 WL 1006712 (5th Cir. Aug. 31, 2001)(same), and ***United States v. Tran,*** 234 F.3d 798 (2d Cir. 2000).

Accordingly, *Mr. Beharry* petitions this Court for rehearing, and rehearing *en banc,* as follows:

I. THE DISTRICT COURT LACKED JURISDICTION TO IMPOSE ANY SENTENCE DUE TO THE FAILURE OF THE INDICTMENT TO ALLEGE A SPECIFIC PENALTY PROVISION AND/OR THE QUANTITY OF DRUGS.

The four substantive counts of conviction did not notify *Mr. Beharry* of any specific penalty provisions for importation under 21 U.S.C. §§ 960(a)(1) and (b), or possession with intent to distribute under 21 U.S.C. §§ 841(b).[5] Further, the indictment only charged *Beharry* with a "detectable amount of cocaine," and never alleged the threshold quantity required to satisfy the elements of the charging statutes.

Additionally, neither the jury instructions or verdict forms required the jury to determine if the quantity of

---

[5]Specifically, Count III (renumbered as Count II) or Count IV (renumbered as Count III) of the indictment never alleged that the relevant penalty provisions for importation, to-wit: 21 U.S.C. §§ 960(a)(1) and (b). Similarly, Counts VII (renumbered as Count V) and Count VIII (renumbered as Count VI) never alleged that the relevant penalty provisions for the offense of possession with the intent to distribute, to-wit: 21 U.S.C. §§ 841(b).

drugs attributable to *Beharry* were 150 kilograms or more to warrant an application of Guideline Level 38 under Section 2D1.1, or five (5) kilograms or more as required under Title 21 U.S.C. § 841(a)(1). As a result, the jury was not instructed to determine quantity by a reasonable doubt standard - or any standard at all.

The failure of indictment to allege the drug quantity or specific penalty provision deprived the District Court of jurisdiction to sentence the Appellant. Accordingly, the trial court lacked jurisdiction to impose any sentence. *See, e.g.*, ***United States v. Longoria,*** 259 F.3d 363 (5th Cir.)(failure of indictment to charge a drug quantity and specific reference to 21 U.S.C. 841(b)(1)(D) deprived the district court of jurisdiction to sentence defendant to more than 5 years incarceration), *rehrg en banc granted*, - F.3d -, 2001 WL 946413 (5th Cir., Aug. 15, 2001).

Inasmuch as the lack of jurisdiction may be raised at any time,[6] this issue was timely raised, and requires

---

[6]The ***Apprendi*** Court did not address the indictment issue because the Presentment Clause of the Fifth Amendment has not been made applicable to the states via the Fourteenth Amendment. *See* ***Apprendi*** at 477 n. 3, 120 S.Ct. 2348. However, in ***Apprendi,*** the Court contrasted the state prosecution before it with the federal prosecution challenged in ***Almendarez-Torres v. United States***, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). *See* ***Apprendi,*** 530 U.S. at 477 n. 3, 120 S.Ct. 2348. In ***Almendarez-Torres,*** the Supreme Court stated that *if* 18 U.S.C. § 1326(b)(2) "constitute[d] a separate crime, then the Government must write an indictment that mentions the additional element." *See*

reversal of the conviction and sentence imposed herein. *Id.* *See* ***United States v. Gonzalez,*** 259 F.3d 355, 359 (5th Cir .2001), *reh'g en banc granted* (5th Cir. Aug. 15, 2001)(explained that because of the jurisdictional "nature" of the error, evidence of the drug quantity at trial or the defendant's acknowledgment of the quantity was irrelevant and could not cure the grand jury's lack of notice of the quantity element (which was an element only because it was used to enhance the sentence). *See id.* at 360 n. 3 .

Moreover, where an indictment does not allege a drug quantity, the evidence adduced at trial supporting the trial court's finding of drug quantity is "not relevant," and may not be used to enhance a defendant's sentence beyond what it charged in the indictment. *Id.* Thus, this Court's use of the drug quantities adduced at trial in affirming the sentence imposed, directly conflicts with ***Gonzalez.***

The Fifth Circuit's holdings in ***Longoria*** and

---

523 U.S. at 226, 118 S.Ct. 1219. More importantly, the ***Apprendi*** Court explicitly adopted as its holding "the opinion that we expressed in [***Jones v. United States,*** 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999)]." *Id.* at 490, 120 S.Ct. 2348. In ***Jones,*** a case involving a federal prosecution, the Court stated that the Fifth and Sixth Amendments require that "any fact (other than prior conviction) that increases the maximum penalty for a crime *must be charged in an indictment,* submitted to a jury, and proven beyond a reasonable doubt." 526 U.S. at 243 n. 6, 119 S.Ct. 1215 (emphasis added)

Gonzalez, *supra,* comport with the ***Apprendi.*** As Justice Stevens stated in the lead opinion in ***Apprendi,*** it "'is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is expose.'" 120 S.Ct., at 2363 (quoting *Jones v. United States,* 526 U.S. 227, 252, 119 S.Ct. 1215, 1228 (1999)(Stevens, J., concurring)). Thus, as the dissenting justices explained, ***Apprendi*** would require:

> any fact (other than prior conviction) that has the effect, in real terms, of *increasing the maximum punishment beyond an otherwise applicable range* must be submitted to a jury and proved beyond a reasonable doubt . . . The principle thus would apply not only to schemes like New Jersey's, under which a factual determination exposes the defendant to a sentence beyond the prescribed statutory maximum, but also to *all determinate-sentencing schemes in which the length of a defendant's sentence withing the statutory range turns on specific factual determinations (e.g., the Federal Sentencing Guidelines).*

Apprendi, 120 S.Ct. at 2391 (O'Conner, J., with whom Rehnquiest, C.J., Kennedy and Bryer, JJ., join, dissenting)(emphasis added).

The application of the Sentencing Guidelines at *Mr. Beharry's* sentencing increased his punishment based on the existence of facts that the jury did not find beyond a reasonable doubt. Inasmuch as the

constitutional rule announced in ***Appréndi*** relied upon ***Jones***[7], and the sentence in ***Jones*** was struck down – even though it did not exceed the prescribed statutory maximum, the rule of ***Apprendi*** is not limited to those instances in which the increased penalty provisions exceed the statutory maximum of the charging statute. *E.g.*, ***United States v. R.L.C.,*** 503 U.S. 291, 112 S.Ct. 1329, 117 L.Ed.2d 559 (1992)(the Court rejected the Government's attempt to argue that an "authorized" sentence only refers to the penalty provisions in the charging statute, rather than the limitations imposed through the Sentencing Guidelines).

Therefore, each fact that increases a defendant's sentencing range, must be submitted to the jury and determined beyond a reasonable doubt. *See,* ***Apprendi,*** 120 S.Ct. at 2367 (Scalia, J., concurring),("all facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by a jury"), and ***Jones,*** *Id.,* at 243, n. 6, 119 S.Ct. 1215.

Additionally, due process and the constitutional right to trial by jury demand that facts that substantially increase the "legally prescribed punishment" be found

---

[7]In ***Jones***, the Court noted that:

> under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

Id., at 243, n. 6, 119 S.Ct. 1215.

by a jury and established beyond a reasonable doubt. Accordingly, the judgment and sentence of *Zimmern Beharry* must be reversed.

II. BASED UPON THE RELEVANT INQUIRY IN *APPRENDI*, TITLE 21 U.S.C. 841 AND TITLE 21 U.S.C. 960 ARE UNCONSTITUTIONAL, BECAUSE EACH EXPOSE A DEFENDANT TO A GREATER PUNISHMENT THAN AUTHORIZED BY THE JURY'S GENERAL GUILTY VERDICT.

After this Court's opinion, the Ninth Circuit examined Title 21 U.S.C. 841(b) in light of "the relevant inquiry" the Supreme Court set forth in ***Apprendi,*** to-wit: according to the effect of the statute, rather than its form, to determine whether it exposes a defendant to a greater punishment than authorized by the jury's guilty verdict. ***United States v. Buckland,*** 259 F.3d 1107, 2001 WL 893440, Slip Op. at 6 (9th Cir., Aug. 9, 2001). Based upon this analysis, the Ninth Circuit held that Section 841(b)(1)(A) and (b)(1)(B) were unconstitutional. *Id. See also,* ***United States v. Hitchcock,*** - F.3d -, 2001 W.L. 951273 (9th Cir., Aug. 23, 2001)(same).

The analysis the Ninth Circuit applied in ***Buckland*** and ***Hitchcock*** is equally applicable here, where *Beharry* is charged with violations of 21 U.S.C. §§ 841 and 952, and was sentenced based upon the uncharged sentencing provisions of Title 21 U.S.C. §§ 841(b) and 960. Therefore, *Beharry* adopts and incorporates herein the reasoning and analysis the Ninth Circuit applied in ***Buckland.*** *See,* ***App. "A."*** Both statutes exposed

Beharry to a greater punishment than the jury's general verdict permitted, and, thus, under the relevant inquiry of ***Apprendi***, are unconstitutional.

III. THIS COURT'S ANALYSIS OF *APPRENDI* CLAIMS IMPROPERLY APPLIES A PLAIN ERROR STANDARD OF REVIEW FOR DEFENDANTS TRIED AND SENTENCED BEFORE *APPRENDI* WAS CONSIDERED OR DECIDED BY THE UNITED STATES SUPREME COURT, AND BEFORE ANY AUTHORITY IN THIS CIRCUIT PROVIDED GROUNDS FOR SUCH RELIEF.

A. A Sentence Above the Statutory Maximum is Reversible Per Se

Before this Court issued its panel opinions in ***United States v. Swatzie,*** 228 F.3d 1278, 1281 (11th Cir.2000) and ***United States v. Candelario***, it was well established that a sentence above the applicable statutory maximum is reversible *per se,* without requiring proof of prejudice under a "plain error" standard of review. *See,* ***Jones v. United States,*** 224 F.3d 1251 (11th Cir.2000)(general sentence exceeded statutory maximum for a count, *citing* ***United States v. Woodard,*** 938 F.2d 1255 (11th Cir. 1991) criticizing lower court for denying relief based on fact that defendant suffered no prejudice; "The test ... is not what the court [or jury] might have done; the test is whether the original sentence comported with the law").

Inasmuch as ***Swatzie*** was not decided *en banc*, it cannot overrule a prior panel decision and require an Appellant to satisfy a "plain error" hurdle after an

Appellant demonstrated such a sentencing error exists. "[O]nly the court of appeals sitting *en banc* or the United States Supreme Court can overrule a prior panel decision." ***Woodard,*** 938 F.2d at 1258. Additionally, where this court is presented with two conflicting cases decided by three-judge panels of the circuit, the earlier case controls. ***Walker v. Mortham***, 158 F.3d 1177, 1188-89, 1189 n. 25 (11th Cir. 1998)(choosing "earliest case" conflict resolution rule because of the importance of the prior precedent rule; "earliest case" rule brings budding intracircuit splits to a "screeching halt"), *cert. denied,* 528 U.S. 809 (1999). Even where the court is not dealing with directly controlling precedent, but rather, with precedent by analogy, "the same rule of *stare decisis* must be applied." ***United States v. Edelman,*** 873 F.2d 791, 794 (11th Cir. 1989).

Additionally, even where an appellant raises an issue on appeal for the first time that was not available at the time of trial or sentencing, a plain error standard of review is inappropriate and denies the Appellant due process and equal protection under the law. *See,* ***Harris v. United States,*** 390 F.2d 616 (8th Cir. 1968), in which the Court reversed the defendant's conviction, even though the issue was only raised on direct appeal. In ***Harris,*** after oral argument, the Supreme Court decided ***Marchetti v. United States,*** 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968), and ***Grosso v. United States,*** 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 902 (1968), in which the Court held that the wagering tax provisions of Title 26 U.S.C. may not be enforced by criminally punishing

those individuals who have properly asserted their privilege against self-incrimination in defense of their noncomplicance with the provisions.

Harris was convicted of operating a lottery without paying the occupational tax imposed 26 U.S.C. § 4411. In his appellate brief, Harris raised for the first time an assertion that criminal enforcement of the wagering tax statutes violates his right against self-incrimination.

Although Harris failed to raise at trial an assertable defense, to-wit: his privilege against self-incrimination. Nonetheless, the Eighth Circuit wholly reversed Harris' conviction. The court relied upon the Supreme Court's reasoning in ***Grosso***[8] in which the Supreme Court felt the Appellant's failure to raise the issue below was understandable and did not constitute a waiver of his ability to assert constitutional right on direct appeal, and was reversed because the appellant did not have the benefit if the Court's new decisions at trial. *Id.*, at 71.

B. <u>Plain Error Analysis Never Applies to Jurisdictional Errors</u>:

---

[8]***Harris*** noted that 28 U.S. C. §2106 provides courts with the authority to:

> affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it fore review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order or require such further proceedings to be had as may be just under the circumstances.

390 F.2d at 617.

Where the grand jury fails to find probable cause as to all of the elements of the enhanced offense such as Title 21 U.S.C. §841(b)(1)(A), the grand jury's omission of an element is a jurisdictional defect, resulting in reversible error *per se* without proof of prejudice. *See,* ***United States v. Alvarez,*** 735 F.2d 461,468 (11th Cir. 1984)(present indictment cannot properly serve as the basis for sentences in excess of five years, where quantity element is absent from indictment).[9] *See also,* ***Stirone v. United States,*** 361 U.S. 212, 217, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960)(deprivation of right to be tried only on charges returned by grand jury "is far too serious to be treated ... as harmless error"); ***United States v. Gayle,*** 967 F.2d 483,485 (11th Cir.1992)(*en banc*); ***United States v. Fern,*** 155 F.3d 1318,1324-25 (11th Cir.1998); ***United States v. Meacham,*** 626 F.2d 503,510 (5th Cir.1980)(objection that indictment fails to charge an offense is a non-waivable jurisdictional defect).

Accordingly, this Court application of a plain error standard of review upon a defendant that did not have the benefit of the ***Apprendi*** decision at trial is improper.

CONCLUSION

---

[9] Although ***Alvarez*** has not been followed in this Circuit since ***United States v. Coy,*** 19 F.2d 629 (11th Cir. 1984), the court in ***United States v. Maslin,*** - F. Supp.2d -, 2000 WL 1294254 (N.D.N.Y. Sept. 14, 2000)(No. 99-CR-159-7), held that after ***Apprendi,*** "it appears that the validity of ... ***Alvarez*** ... has been reinstated").

Based on the foregoing reasons and authorities, the Appellant, *Zimmern Beharry*, respectfully requests that his convictions and sentence be reversed.

Respectfully submitted,

Rhonda A. Anderson, Esq.
Counsel for *Zimmern Beharry*
2222 Ponce De Leon Blvd, Suite 500
Coral Gables, Florida 33134
Telephone: (305) 444-1400
Facsimile: (305) 444-1487
<rhoander@bellsouth.net>
Florida Bar No: 708038

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing was mailed on September 14, 2001, to: ***Sangita K. Rao, Esq.,*** U.S. Department of Justice, P. O. Box 899, Benjamin Franklin Station, Washington, D.C. 20044-0899.

RHONDA A. ANDERSON, ESQ.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 00-11371-JJ

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ZIMMERN BEHARRY,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

October 22, 2001

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC.

(Opinion_____, 11th Cir., 19__, __F.2d____)

Before:BARKETT and HULL, Circuit Judges, and LIMBAUGH*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

*Honorable Stephen N. Limbaugh, U.S. District Judge for the Eastern District of Missouri, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 00-11371-JJ

District Court Docket No. 94-06015-CR-DTKH

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ZIMMERN BEHARRY,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion, included herein by reference, is entered as the judgment of this Court.

Entered: July 6, 2001
For the Court: Thomas K. Kahn, Clerk
By: McCombs, Elaine

ISSUED AS MANDATE: OCT. 30, 2001
U.S. COURT OF APPEALS
ATLANTA, GA

CONSTITUTIONAL PROVISIONS & STATUTES

U. S. Const., amend V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Const. amend VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

21 U.S.C. § 841(a) - Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

21 U.S.C. § 841(b) - Penalties - (Excerpt)[1]

Except as otherwise provided in section 859, 860, or 861 of

---

[1] The excerpts include penalties for cocaine only.

this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving--

* * *

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859,

860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving--

* * *

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the

provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, . . . except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in

accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

21 U.S.C. § 846 - Attempt and Conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

U.S.S.G. § 2D1.1 (Excerpt)[2]

§ 2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy.

(a) Base Offense Level (Apply the greatest):

(1) 43, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) 38, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1),

---

[2]The excerpts include penalties for cocaine, but not cocaine base.

(b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

(2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

(3) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by 2 levels.

(4) If (A) the offense involved the importation of methamphetamine or the manufacture of methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under § 3B1.2 (Mitigating Role), increase by 2 levels.

(5) If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance, or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.

(6) If the defendant meets the criteria set forth in subdivisions (1) to (5) of § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) and the offense level determined above is level 26 or greater, decrease by 2 levels.

(c) DRUG QUANTITY TABLE

	Controlled Substances and Quantity	Base Offense Level
1	* * *	Level 38
	•150 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	
2	* * *	Level 36
	•At least 50 KG but less than 150 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	
3	* * *	Level 34
	•At least 15 KG but less than 50 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	
4	* * *	Level 32
	•At least 5 KG but less than 15 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	
5	* * *	Level 30
	•At least 3.5 KG but less than 5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	
6	* * *	Level 28
	•At least 2 KG but less than 3.5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	
7	* * *	Level 26
	•At least 500 G but less than 2 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	
8	* * *	Level 24
	•At least 400 G but less than 500 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	

9	* * *	Level 22
	•At least 300 G but less than 400 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	
11	* * *	Level 18
	•At least 100 G but less than 200 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	
12	* * *	Level 16
	•At least 50 G but less than 100 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	
13	* * *	Level 14
	•At least 25 G but less than 50 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	
14	* * *	Level 12
	•Less than 25 G Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	
	* * *	